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CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

**11th meeting of the Joint Council
on Constitutional Justice**

Brno, Czech Republic, 31 May – 1 June 2012

**MINI-CONFERENCE ON
“THE RULE OF LAW”**

REPORT

by
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1. The Rule of Law as a Practical Concept is a beautiful topic. May I compliment the Joint Council with its choice for today's mini-conference. I am happy to be here in Brno and to be among the participants who have got the chance to elaborate on the case law of their courts.

I work for the Council of State of the Netherlands as legal secretary to the Council's Constitutional Law Committee. In this capacity I have been involved in a project on the Rule of Law in relation to the Council of State as secretary to the supervisory committee and to the working group implementing the results of the project. Before I tell you more about this project and the lessons which can be learned from it, I will say a few words on the Dutch constitutional framework and the Council of State itself, the background against which this project has been carried out.

2. The Netherlands is among the few countries in Europe that do not have a Constitutional Court. In fact, the Netherlands does not even have one single highest court; neither the Court of Cassation, nor the Council of State is a 'Supreme Court' in this sense. Besides, in the Netherlands constitutional review by the courts is limited. On the one hand, Article 120 of the Constitution forbids the courts to look into the constitutionality of Acts of Parliament, in the sense of their conformity with the written Constitution; the courts may, however, review the constitutionality of lower regulations, such as Royal decrees and municipal regulations. On the other hand, in virtue of Article 94 of the Constitution, the courts shall not apply provisions of an Act of Parliament which violate self-executing provisions of a treaty to which the Netherlands is a party or of binding decisions of international organisations. It is clear that in this constitutional framework, in which constitutional review by the courts is limited, constitutional review of draft legislation by the legislator is rather important.

3. How does the Council of State fit into this constitutional framework? The Council of State is a very old institution; it is more than 480 years of age. It still has important constitutional tasks¹ and nowadays it acts as both an advisory body and an administrative court; there is an Advisory Division and there is an Administrative Jurisdiction Division. Formally, the Council is presided over by the Her Majesty the Queen. In daily life, however, it is the vice-president who is in charge. Since February of this year, Mr Donner has been appointed to this task. Members of the Council and of the Divisions are called 'State Councillors'. They are involved in the advisory and/or adjudicative tasks of the Council.²

4. The Council advises both Government and Parliament *inter alia* on draft legislation and the approval of treaties. Its advisory opinion is required under Article 73 of the Constitution. If the Council has not previously given its opinion, a Bill cannot be submitted to Parliament for approval. Review by the Council of State includes 'the constitution', that is the written Constitution of the Netherlands (*Grondwet*), the Statute of the Kingdom, the human rights treaties to which the Netherlands is a party and the constitutional part of European Union law. The Council's advisory opinions are not binding, but they are considered to be rather influential.

5. The Council as an Administrative Court deals with cases in the field of spatial planning, aliens law and many other fields, such as electoral law, educational law and access to public information. The Administrative Jurisdiction Division of the Council of State is the highest administrative court with general jurisdiction, so no appeal for cassation can be lodged against its judgments.

¹ Article 35(1) of the Constitution reads: "If the Cabinet is of the opinion that the King is unable to exercise the royal prerogative it shall inform the two Houses of the States General accordingly and shall also present to them the recommendation it has requested from the Council of State. The two Houses of the States General shall then meet in joint session." Article 38 provides that the royal prerogative shall be exercised by the Council of State until such time as alternative provision is made for the exercise of such power.

² For further information, see www.raadvanstate.nl/english.

6. As I mentioned in the introductory part of my speech, I work for the Constitutional Law Committee of the Council. This Committee provides preliminary reports for the benefit of both the Advisory Division and the Administrative Jurisdiction Division. These reports are only provided on request, they are non-binding and not published, since they are internal documents. The Committee consists of State Councillors who are experts in the field of constitutional law. The Constitutional Law Committee also supervises research projects on constitutional law, for instance the abovementioned Rule of Law-project.

7. The project's main purpose was to learn more about the Legal Meaning and Scope of the concept of the Rule of Law in the Council's judgments and advisory opinions. The project has been initiated at the request of the Vice-President of the Council in 2010. The research was carried out by a research team headed by the Professors Voermans and Gerards from Leiden University.³

8. Their research focused on the Rule of Law in Dutch legal doctrine and in the Council of State's judgments and opinions. It covered some 60 judgments and 60 advisory opinions. The researchers came along with some very interesting recommendations, and most useful, they proposed taxonomies for the Council, which are basically checklists for cases which have a high 'Rule of Law impact'.

9. According to the Netherlands Scientific Council for Government Policy, the Rule of Law is a multi-level concept: there are 'basic concepts', 'constitutional principles' and 'constitutional positive norms' and, finally, cases in which these concepts, principles and norms are applied.

10. According to Dutch legal doctrine, among the Rule of Law's basic concepts are in any case: 1) legality, 2) separation of powers, 3) fundamental rights and 4) an independent judiciary. There is no consensus about whether the concepts of 'democracy' and 'social dimension' should be included.

11. If we try to visualize the Rule of Law as 'multileveled', we can for instance think of 'legality' as a basic concept, of 'equality before the law' as a constitutional principle, and of the 'positive norm' that 'all persons in the Netherlands shall be treated equally in equal circumstances', a norm which is laid down in Article 1 of the Constitution of the Netherlands.

12. But how does all this theory relate to practice? Let's take a look at the 'Jesus saves'-case, one of the examples used in the taxonomy, available in the *Bulletin on Constitutional Case-Law* and in the CODICES Database.⁴ What had happened? A farmer had written 'Jesus saves' (in Dutch: *Jezus redt*) in very large white letters (in white roof tiles) on the roof of his house. The mayor and aldermen of the municipality he lived in did not approve in the interest of the protection of the environment and traffic safety; they ordered the farmer to remove the white roof tiles. The District Court found for the municipality and the farmer then appealed to the Administrative Jurisdiction Division of the Council of State, arguing that his rights to freedom of religion and freedom of expression under the Constitution and the European Convention on Human Rights had been violated. But again the applicant was not successful, as the Administrative Jurisdiction Division of the Council of State held that the limitation of his rights did not relate to the content of the text, but merely to the way in which the farmer had expressed himself: he could choose other means of expression, for instance by using a smaller type of letters in a less striking colour or by exposing the text on other parts of his property instead of the roof.

³ W.J.M. Voermans and J.H. Gerards, *Juridische betekenis en reikwijdte van het begrip 'rechtsstaat' in de jurisprudentie & jurisprudentie van de Raad van State* [Legal Meaning and Scope of the Rule of Law in the Council's judgments and advisory opinions], The Hague, Council of State, 2011.

⁴ AJD, judgment of 14 July 2010, No. 200906181/1/H1, CODICES NED-2010-2-004 (X v. mayor and aldermen of Giessenlanden).

In this example, the 'basic concept' is 'fundamental rights protection', the 'constitutional principle' is 'fundamental rights' and the 'positive norms' are Articles 6 and 7 of the Constitution and Articles 9 and 10 of the Convention.

13. Another example is the 'Landsbanki'-case.⁵ In this case the Administrative Jurisdiction Division of the Council of State quashed the Royal Decree of the Dutch Crown that barred the Province of North Holland, a number of municipalities and some other public bodies from recouping their outstanding deposits worth € 145 million in the Icelandic bank Landsbanki through the Dutch courts. The Crown had barred those authorities, because their attempts to recover money amounted to a direct interference with confidential and diplomatic consultations with the Icelandic State and would jeopardise savers' interests. The public authorities concerned argued in appeal that the Royal Decree hampered their access to the civil law courts. The Administrative Jurisdiction Division of the Council of State held that it did not become clear from the reasons given by the Crown in the Royal Decree, how the public authorities' interests in terms of legal certainty (access to the civil law courts) had been taken into account. And this was a very serious matter, according to the Administrative Jurisdiction Division of the Council of State, because legal certainty is essential to a democratic State under the Rule of Law.

In this example, a 'basic concept' is 'legality', a constitutional principle is 'adherence to legal principles, including the general principles of sound administration' and 'positive norms' are the (unwritten) legal certainty principle and the duty to give reasons for decisions by public authorities (laid down in the General Administrative Law Act).

14. After the examination of 120 cases the researchers concluded that the use of a multi-level Rule of Law concept in the case-law and opinions of the Council of State was not always systematic and not always explicit. They also noticed, that the Advisory Division of the Council of State had a preference for reviewing draft legislation in the light of ECHR-clauses rather than Constitutional clauses. Finally, the Council seemed to apply constitutional principles which were not connected to the Rule of Law by Dutch legal scholars, such as the separation of State and Church and the notion of pluralism.

15. The results of the Rule of Law-study have been published by the Council of State.⁶ A copy can be found in the Venice Commission's library. In the meanwhile, the results have been debated within the Council. In December 2011 a mini-conference was held for this purpose; central topic on that occasion was how the Council could benefit from the recommendations made by the researchers. The participants shared the opinion that the taxonomies will be helpful with regard to the preparation of judgments and opinions with a high 'Rule of Law impact', as they are detailed checklists and richly illustrated with examples derived from the Council's own judgments and opinions.

⁵ AJD, judgment of 22 April 2009, No. 200809196/1, CODICES NED-2010-1-002 (The Provincial Executive of North-Holland and others v. the Crown).

⁶ *Studies en Rapporten* [Studies and Reports], No. 4.